

FCC MAIL SECTION
Federal Communications Commission**FCC 00- 120**

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**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	MM Docket No. 95-31
)	
Reexamination of the Comparative)	
Standards for Noncommercial)	
Educational Applicants)	

REPORT AND ORDER**Adopted: April 4, 2000****Released: April 21, 2000**

By the Commission: Commissioners Furchtgott-Roth and Tristani approving in part,
dissenting in part and issuing a joint statement; and Commissioner Tristani issuing a separate
statement.

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I. INTRODUCTION

1. The Commission hereby adopts new procedures to select among competing applicants for noncommercial educational ("NCE") broadcast channels. The new selection process replaces a subjective comparative hearing process that has been used for the past thirty years. We believe that the new system will be faster and less expensive than the former system but will continue to foster the growth of public broadcasting as "an expression of diversity and excellence, and . . . a source of alternative telecommunications services for all citizens of the Nation." 47 U.S.C. §396(a)(5).

2. The new system will use points to compare objective characteristics whenever there are competing applications for full-service NCE radio or television stations on channels reserved for noncommercial educational use. The point system will also be used, but to a more limited extent, to evaluate competing applications for NCE-FM translators. On non-reserved channels, we will generally use auctions to select among competing applications, even if NCE applicants are among the competitors. We have determined that we are not

precluded from using auctions when an NCE entity applies for a commercially available channel, and that the use of auctions on commercially available channels best reconciles conflicting directives in the statute. We will, however, provide additional opportunities for NCE entities to demonstrate – prior to filing an application – that a non-reserved channel should be reserved, and therefore not subject to auction. To make such a demonstration, the NCE entity will need to show that there is a greater need for permanent noncommercial educational service than for commercial service in its proposed service area.

3. For NCE radio station applications for frequencies on the reserved band, which can be mutually exclusive even if they specify different communities, we will first determine whether award of an NCE radio station to one locality over another would best achieve the goal of fair distribution of frequencies, and proceed to a point system only if this threshold issue is not dispositive. See 47 U.S.C. § 307(b). For mutually exclusive NCE television station applications, which are always for the same community due to the use of a television table of allotments, we will proceed directly to a point system. Under the new point-based selection process, we will award a construction permit for NCE radio and television stations to the applicant that receives the most points, with points awarded for local diversity, technical superiority, localism, and state-wide networks. If a tie results, and the parties are unable to settle among themselves, we will break the tie by awarding the permit to the applicant with the fewest existing authorizations and, if that fails to break the tie, with the fewest number of outstanding applications. For purposes of applying the point system, interests of related organizations and officers will be attributable to the applicant. As the point system is technically considered a form of comparative hearing, and hearings generally must be conducted by Administrative Law Judges or by the Commission, we will seek legislative authority to delegate responsibility for conducting the point system to our staff. In response to suggestions from commenters concerned about past abuses in the NCE licensing process and potential abuse in a process based on a point system, we will accept applications during filing windows, instead of using the current "A/B cutoff" method, and establish a four-year holding period for permits awarded through comparative consideration. To facilitate the transition to the new NCE application process, we will implement a temporary filing freeze on applications for new and major changes to existing NCE stations.

II. BACKGROUND AND HISTORY

4. As fully described in the Further Notice of Proposed Rulemaking in this proceeding ("Further Notice"), 13 FCC Rcd 21167 (1998), the broadcast spectrum is divided into "reserved" and "non-reserved" channels. The reserved channels are for noncommercial educational use only, while the non-reserved channels are for all types of broadcasting, commercial and noncommercial. From the earliest days of broadcasting, and for both reserved and non-reserved spectrum, the Commission used traditional evidentiary hearings to select among competing applicants. The factors considered in hearings for reserved spectrum differed, however, from those used on nonreserved spectrum. In comparative hearings for reserved spectrum, the primary decisional factor used to choose between

applicants proposing to serve the same community was "the extent to which each of the proposed operations will be integrated into the overall educational operations and objectives of the respective applicants." See New York University, 10 RR 2d 215, 217-18 (1967). In comparative hearings for non-reserved spectrum, the Commission developed a variety of comparative criteria, including the "integration" of ownership and management, which presumed that a station would offer better service if its owners were involved in the station's day-to-day management. See Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393 (1965). If NCE applicants applied for non-reserved channels, all applicants - - NCE and commercial - - were evaluated using the commercial criteria.

5. Interest in changing the comparative selection process both for NCE and commercial stations dates back to the early 1990's. First, the Commission's Review Board described the NCE hearing criteria as "vague" and "meaningless," and indicated that it was often difficult to make a rational choice in noncommercial licensing cases. Real Life Educational Foundation of Baton Rouge, Inc., 6 FCC Rcd 2577, 2580, n.8 (Rev. Bd. 1991). Shortly thereafter, a federal court held that the core integration criterion used to evaluate non-reserved applications, was "arbitrary and capricious, and therefore unlawful." FCC v. Bechtel, 10 F.3d 875, 878 (D.C. Cir. 1993) (Bechtel II). As a result, we initiated a broad inquiry into possible changes to the selection processes for both commercial and noncommercial broadcasters.¹ The Commission froze all ongoing comparative cases pending the establishment of new criteria. See Notice of Proposed Rulemaking, MM Docket No. 95-31, 10 FCC Rcd 2877, 2879 (1995) (Notice) (reserved channels); Public Notice, FCC Freezes Comparative Hearings, 9 FCC Rcd 1055 (1994), modified, 9 FCC Rcd 6689 (1994), further modified, 10 FCC Rcd 12182 (1995) (non-reserved channels).

6. Subsequently, Congress enacted the Balanced Budget Act of 1997 requiring the use of auctions to select among mutually exclusive applicants for commercial broadcast station licenses. See Balanced Budget Act of 1997, Pub. L. No. 105-33, 11 Stat. 251 (1997) (Balanced Budget Act). We recently implemented commercial auction procedures. Report and Order, Competitive Bidding for Commercial Broadcast and ITFS Service Licensees, MM Docket No. 97-234, FCC 99-74, 14 FCC Rcd 8724 (1999). (Competitive Bidding). However, the Balanced Budget Act does not extend mandatory auction authority to construction permits for "noncommercial educational broadcast stations" and "public broadcast stations," as defined by Section 397(6) of the Communications Act. See 47 U.S.C. §§ 309(j)(2)(C), and 397(6). With respect to such stations, the Commission has

¹ See Notice of Proposed Rulemaking, Reexamination of the Policy Statement on Comparative Broadcast Hearings, GC Docket No. 92-52, 7 FCC Rcd 2664 (1992); Further Notice of Proposed Rulemaking, 8 FCC Rcd 5475 (1993); Second Further Notice of Proposed Rulemaking, GC Docket No. 92-52, 9 FCC Rcd 2821 (1994); Notice of Proposed Rulemaking, Competitive Bidding for Commercial Broadcast and ITFS Service Licensees, MM Docket No. 97-234, GC Docket No. 92-52, Gen. Docket No. 90-264, 12 FCC Rcd 22,363 (1997); First Report and Order, MM Docket No. 97-234, GC Docket No. 92-52, Gen. Docket No. 90-264, 13 FCC Rcd 15,920 (August 18, 1998), recon. denied Memorandum Opinion and Order, 14 FCC Rcd 8724 (1999); modified Memorandum Opinion and Order, 14 FCC Rcd 12,541 (1999).

continuing authority to use other selection methods, such as lotteries and traditional comparative hearings.² See, e.g. Balanced Budget Act, § 3002(a), codified as 47 U.S.C. § 309(i)(5)(B). In this proceeding, the Commission issued a Further Notice of Proposed Rule Making asking whether a lottery, point system, or modified comparative hearing was the best selection procedure on channels reserved for NCE use. Further Notice of Proposed Rulemaking, Comparative Standards for Noncommercial Educational Applicants, MM Docket No. 95-31, 13 FCC Rcd 21167 (1998) ("Further Notice"). In view of the mandatory use of auctions for commercial stations, coupled with the exemption of NCE stations from auction, the Commission also sought comment on whether, and under what procedures, noncommercial entities may continue to compete with commercial applicants for non-reserved spectrum. In response to the Further Notice, we received approximately 60 comments, many of which were filed jointly with others, representing the views of well over 100 organizations. See Appendix B.

III. DISCUSSION

A. Selection Methods on Reserved NCE Spectrum

7. The Further Notice sought comment on three possible ways to select among applicants competing for NCE reserved channels: (1) a simplified traditional hearing; (2) a weighted lottery; and (3) a point system. There is some support in the comments for each of the three options presented, as well as a new suggestion that permits be awarded to the first applicant to file. However, the vast majority of commenters favor use of a point system in which applicants would be awarded points for different aspects of their proposals and the applicant with the highest score would win. As discussed below, each method has some merit, but we agree with the majority of the commenters that a point system is best.

1. Traditional Comparative Hearings

8. Several commenters believe that traditional hearings are necessary to select the very best applicant. Educational Information Corporation, for example, says that because hearings involve live interaction between the applicants and an Administrative Law Judge (ALJ), hearings result in reasoned decisions based on fine details, impossible to consider in other more mathematical or random selection procedures. The Center for Media Education maintains that an ALJ can differentiate between candidates who both have a certain characteristic, but who manifest that characteristic to different degrees. Pinebrook Foundation notes that the presence of an ALJ is very effective in exposing sham applications.

9. The vast majority of commenters, however, believe that the benefits of traditional hearings are outweighed by their disadvantages. Community Television, Inc. states that the

² But see Section III(H) infra concerning NCE applicants on non-reserved "commercial" channels.

subjective nature of hearings makes it difficult for applicants to evaluate their chances of prevailing, resulting in lengthy proceedings, where the costs are prohibitive for many noncommercial educational organizations. Cornerstone Community Radio says that the traditional NCE hearing is more like a "war of attrition" than a process for selecting the best applicant. Several NCE licensees who have participated in the traditional hearing process maintain that cases were more often resolved by settlement among the parties than by ALJ decision.³ Commenters, such as Mohave Community College, recognize that hearings can be much more thorough than other selection methods, but believe that there is a greater public interest in expediting new service to the public and in minimizing burdens on applicants and the Commission.

10. Upon considering the comments, we conclude that the primary benefits of traditional hearings (e.g., the ability to make fine distinctions between candidates and the ability to expose potential abuse by questioning applicants in front of a judge) are not substantial enough to justify maintaining that cumbersome approach. Lengthy traditional hearings are costly to noncommercial applicants (who often are less able to afford these costs than commercial applicants), require expenditure of substantial Commission resources, and significantly delay the implementation of noncommercial educational service to the public. The primary benefits of hearings can be accomplished to a large extent in shorter qualitative comparisons, coupled with safeguards to address any potential for abuse. Eliminating traditional hearings for NCE applicants would be consistent with our efforts to simplify and streamline our broadcast regulations overall, and with our elimination of commercial comparative hearings.⁴ See First Report and Order, Streamlining of Radio Technical Rules, MM Docket No. 98-93, FCC 99-55, 14 FCC Rcd 5272 (1999); Report and Order, Streamlining of Mass Media Applications, Rules and Processes, MM Docket Nos. 98-43, 94-149, 13 FCC Rcd 23,056 (1998); Competitive Bidding, 13 FCC Rcd 15920 (1998). Accordingly, we reject proposals that ask us to retain the traditional hearing process.

2. Lotteries or First to File Approach

11. In response to the desire for a simpler, fairer, and less costly approach, several commenters support the use of lotteries, such as those once used in the Low Power Television Service.⁵ In response to our concern that applicants selected through a random

³ Comments of Station Resource Group at 8; Comments of Alaska Public Telecommunications, Inc., et al. at 4.

⁴ For commercial applications filed after July 1, 1997, the elimination of hearings was mandated by statute, but for applications filed prior to that date, the elimination of hearings was within the Commission's discretion.

⁵ See, e.g., Comments of Educational Media Foundation. Competing LPTV applications are now resolved by auctions instead of lotteries pursuant to our Comparative Bidding decision. See note 1, supra.

process may not be the most likely to provide the highest level of public service, a few commenters state that, because NCE stations must satisfy the needs of listeners and underwriters to survive financially, they are as likely to provide a high level of service as applicants chosen through other processes.⁶

12. American Family Association also supports a simplified process, but believes that a "first in line" approach is preferable to a lottery. American Family would award a permit to the first qualified applicant to file. It views this as a way to encourage "pioneer" applicants who undertake the engineering work to identify an available NCE radio channel, and to discourage "copycat" applications that simply photocopy portions of the initial applications. American Family maintains that a first to file approach would be easily understood by the public, require no subjective decisions by the Commission, and be fair to every applicant.

13. The lottery and first to file suggestions are both opposed by other commenters. There is particularly strong opposition to lotteries from a broad range of NCE applicants who collectively voice three major concerns: (1) speculation; (2) failure to select the best applicant; and (3) the potential for judicial challenge and delay. With respect to speculation, commenters such as CSN International maintain that a lottery process would encourage an applicant to file more applications than necessary, just to "beat the odds." A few commenters conducted a study of our frozen proceedings, and believe that speculation has already begun based on the theory that we might have a lottery.⁷ With respect to selection of the best applicant, commenters observe that the random nature of lotteries makes it entirely possible that the least qualified applicant could win. They maintain that even if a lottery is weighted to favor applicants with certain desirable qualifications, such weighting only gives an applicant additional chances, and that the outcome of a lottery remains random.⁸ Finally, commenters are concerned that, as noted in the Further Notice, there are two lottery weightings, for broadcast diversity and minority ownership, that are mandated by statute, and which the Commission cannot change. See 47 U.S.C. § 309(i)(3). The commenters believe that these mandatory preferences may be difficult to apply to noncommercial broadcasters and/or unconstitutional in light of a United States

⁶ See, e.g., Comments of Pensacola Christian College at 14-15.

⁷ Alaska Public Telecommunications, Inc., for example, states that it has analyzed information about competing NCE applications on the Commission's internet web site, and that over 400 of our current applications involve 15 to 20 NCE applicants who have overfiled against each other in virtually every state.

⁸ See, e.g., Reply Comments of Educational Information Corp. at 6 ("We are very concerned and quite worried that the Commission is seriously considering a 'ping-pong ball, bingo machine' lottery approach The Commission should consider that even if the preponderance of evidence clearly shows that one applicant is better qualified in a particular comparative situation, the lottery method could still select . . . the least qualified of the lot.")

Supreme Court holding that racial preferences are subject to strict scrutiny.⁹

14. There is likewise little support for using a first to file approach as a stand alone selection method, although some commenters find it less objectionable as a component of a point system. Opponents to the first to file approach say that its only benefit is processing expedience. They believe that it would shift our applicants' focus from the quality of applications to the speed with which they can file.¹⁰

15. If our only goals were to select among competing NCE applicants easily and quickly, lotteries or first to file procedures would be excellent choices. Speed and efficiency are, however, only a part of what we seek to achieve. Public broadcasting holds a special place in meeting the informational, cultural, and educational needs of the nation. Neither a lottery nor a first to file approach is the optimal way to select applicants who will provide "diversity and excellence" in educational broadcasting to the public. See 47 U.S.C. § 396(a)(5). The statutory requirement that broadcast lotteries be weighted would increase the probability of selecting such an applicant, but, as noted by the commenters, would provide no assurance of such an outcome. It is also apparent from the comments that the statutory weightings will almost certainly become the subject of lengthy constitutional litigation, which would jeopardize the major benefit of lotteries: speed.¹¹ Accordingly, we reject these approaches.

3. Point Systems

16. There is broad support in the comments for use of a point system selection process. Under such a system, the Commission assigns points to various characteristics, evaluates applications for those characteristics, and awards a permit to the applicant with the highest score. Such a system has been used in the Instructional Television Fixed Service (ITFS), which also has educational goals. Commenters say that, in comparison to traditional hearings, a point system is an objective, inexpensive, and streamlined process.¹²

⁹ Adarand Constructors v. Peña, 515 U.S. 200 (1995). See also Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344; petition for rehearing denied, 154 F.3d 487; petition for rehearing en banc denied, 154 F.3d 494 (D.C. Cir.1998).

¹⁰ Reply Comments of Center for Media Education, et al. at 16; Reply Comments of Mohave Community College at 5-6.

¹¹ One commenter argues that we could hold a straight lottery without statutory weightings because the simplicity of a lottery would in itself increase the applicant pool, and foster the statutory goals of diversity and minority ownership. See Comments of Pensacola Christian College at 9. In view of the specific language of the statute and its legislative history, as discussed in the Further Notice, we cannot accept this view that an unweighted lottery is legally permissible. See Communications Amendment Act of 1982, S. Rep. No. 97-101, 97th Cong., 2d Sess. (1982), reprinted in 1982 U.S.C.A.N. 2237, 2291-92; Telecommunications Research and Action Center v. FCC, 836 F.2d 1349 (D.C. Cir. 1988).

¹² Comments of National Public Radio, et al. at 6; Comments of Roaring Fork Public Radio Translator, Inc., et al. at 2.

Commenters also believe that a point system would make best use of scarce spectrum because the prevailing applicant would be the one proposing the most meritorious use, as defined by the points.

17. Commenters opposing a point system are generally those who strongly prefer one of the other options discussed above, and their reasons for disfavoring a point system generally correspond to their perception that another choice is superior. American Family Association, for example, a proponent of the simplicity of a first to file option, maintains that a point system, though simpler than a traditional hearing, is still too burdensome and time consuming because the Commission would continue to evaluate each application on the merits. Similarly, Educational Information Corporation, which strongly favors the thorough scrutiny that is possible in traditional hearings, believes that applicants can too easily manipulate a point system to obtain credits for which they do not truly qualify. Pensacola Christian College is concerned that a point system will discourage meaningful differences between applicants, because applicants will become homogeneous to conform to the ideals of the point system.

18. Nonetheless, after carefully weighing the pros and cons of all options, we have, as indicated, decided to use a point system to select among NCE applicants on reserved channels. We believe that an appropriately crafted point system can achieve a wide range of our goals for NCE broadcasting simultaneously. Through a point system, we can eliminate the vagueness and unpredictability of the current system, clearly express the public interest factors that the Commission finds important in NCE broadcasters, and select the applicant who best exemplifies these criteria. A point system would reduce the costs and time associated with comparative proceedings both for applicants and the Commission. NCE applicants, who often have limited financial resources, would not incur the large travel and legal expenses associated with preparing a case for hearing, giving live testimony, and cross-examining the testimony of others in traditional hearings. The Commission could render decisions relatively quickly by replacing lengthy narratives with simpler point tallies. Further, applicants that do not meet at least some of the criteria will be less likely to apply than in a random selection method in which they might win through luck alone. We recognize, as mentioned in the comments, that applicants may adopt various factors included in the point system, rather than those elements appearing spontaneously. If our point system provides an impetus for future NCE applicants to manifest characteristics that are genuine and in the public interest, we would view this as a positive result, regardless of any spontaneity. Of course, we would be concerned if these characteristics were merely feigned, and thus will select factors that are not easily subject to gamesmanship. We discuss below the factors we will include in our point system.

B. Elements In An NCE Point System

19. In the Further Notice we proposed to award points to applicants who: (1) would offer a first or second NCE service to the community; (2) who had no other nearby stations; and (3) would serve at least ten percent more area and people than a competing proposal. The

Further Notice also indicated our willingness to consider other factors. We specifically asked whether commenters would support credits for applicants: (1) controlled by minorities; (2) that have an established educational presence in the community; (3) that are part of an existing educational plan of a state or municipality; and/or (4) whose leadership would be significantly more representative of the community than other applicants. Although the commenters overwhelmingly support a point system, there is no corresponding level of agreement on the individual elements that would make up such a system, the number of points to be awarded to each element, or what to do in the event of a tie. However, the commenters' critique of the elements in our proposed system, together with their proposed modifications, form a good basis for our construction of a point system that will best serve the public interest. A summary of the point system that we have selected appears as Appendix A to this decision. In brief, we will consider fair distribution of stations to communities as a threshold issue and, if a decision is not reached on the basis of that factor, we will consider which applicant merits points for localism, technical superiority in terms of area and population served, and either diversity of ownership or service to accredited schools through a state-wide network.

1. Fair Distribution of Service as a Threshold Issue (Reserved Band Radio only).

20. In the Further Notice we proposed that, for mutually exclusive NCE FM radio applicants proposing to serve different communities on reserved channels, we would award points to the applicant that would serve a community receiving no other or limited other NCE service. We did not propose to consider this factor at the application stage for NCE television stations on reserved channels because reserved television channels are allotted to specific communities by table based on consideration of fair distribution standards. As a result, all mutually exclusive television applications necessarily propose service to the same community. Our analysis of NCE fair distribution also does not apply to AM channels because no AM channels are reserved for NCE use.

21. The Further Notice proposed to award a credit of two points for radio applicants offering first local NCE radio service received in a community. We proposed that radio applicants offering the second NCE service received or the first local service licensed to a particular community would receive one point. We noted that this proposal was based on Section 307(b) of the Communications Act, which states that the Commission must "provide a fair, efficient, and equitable distribution" of broadcast service among the states and communities. 47 U.S.C. § 307(b). The 307(b) factors proposed in the Further Notice are closer to those which have been used in commercial proceedings, than in NCE proceedings. The NCE 307(b) analysis, developed in New York University, 10 RR 2d 215 (1967) looked at "the number of other reserved channel educational FM services available in the proposed service area of each applicant and the areas and populations served thereby." The first service/second service type of analysis proposed, while derived from commercial broadcasting, is more readily adapted to an NCE point system, and more consistent with our ongoing goal to evaluate applications quickly, with minimal burden on applicants and on the staff.

22. The commenters generally recognize that fair distribution of service is an important concept and that it is appropriate to consider when there are competing NCE radio applications proposing to serve different areas. See Seattle Public Schools, 4 FCC Rcd 625 (1989). For example, Colorado Christian University maintains that consideration of this factor is vital to provide educational broadcasting to unserved and underserved communities. Sacred Heart University urges the Commission to consider fair distribution of service issues first, as a threshold issue, as it has done in the past, before applying a point system.¹³ Many of the commenters who support a credit for a first or second service to underserved areas believe that no corresponding credit should be awarded for first local NCE station licensed to a particular community. These commenters are concerned about the potential for abuse by applicants identifying small communities, when they propose facilities nearly identical to an applicant proposing to serve a large community and in fact intend themselves to serve that large community. Some comments, which were filed before we proposed in a separate proceeding to establish community coverage requirements for NCE facilities, argue that community of license is less meaningful in the NCE service because licensees are not required to cover their community of license with a specified signal strength.¹⁴

23. Several commenters, while supporting inclusion of a Section 307(b) component in the NCE selection system, believe that Section 307(b) factors will rarely be decisive. According to these commenters, about 91% of the country's population already receives at least one NCE radio signal.¹⁵ There is also concern that the population receiving a first or second service be of a sufficient size to be meaningful. Commenters thus ask the Commission to define what constitutes a significant population receiving first or second service, and WAY-FM, Inc. suggests that the Commission establish one source or computer program, so that calculations can be consistent. To avoid abuse, Station Resource Group states that licenses awarded to applicants on the basis of Section 307(b) superiority should be conditioned on the applicant constructing substantially as authorized.

24. Upon consideration of the comments, we conclude that fair distribution of service should remain a threshold issue, rather than one of several factors considered together with others in a point system. This approach would be most consistent with our existing Section 307(b) approach, which has been upheld in court and recently followed in

¹³ Reply Comments of Sacred Heart University, et al at 3.

¹⁴ Since these comments were filed, we have proposed coverage requirements for NCE stations. See Notice of Proposed Rulemaking, MM Docket No. 98-93, Streamlining of Radio Technical Rules, 13 FCC Rcd 14,649, 14,876 (1998) ("Technical Streamlining").

¹⁵ See Comments of NPR, et al. at 37, n. 86; Comments of Station Resource Group.

establishing auction procedures for commercial AM radio stations. See FCC v. Allentown Broadcasting Corp, 349 U.S. 358 (1955); Pasadena Broadcasting Co. v. FCC, 555 F.2d 1046 (D.C. Cir. 1977); Competitive Bidding, 13 FCC Rcd 15920, 16010 (1998). We recognize that there may not be a large number of cases in which Section 307(b) issues will be dispositive. Nevertheless, in those cases where there are substantial Section 307(b) differences, such matters will be addressed first. In examining fair distribution issues, we will use the general process set forth in the Section of our Competitive Bidding proceeding that addressed Section 307(b) considerations for AM stations. See Competitive Bidding 13 FCC Rcd 15920 (1998). Generally, a proposal to provide the first NCE service received by a comparatively large population will be preferred over another providing the first NCE service received by a significantly smaller population, or the second NCE service to any sized population. Similarly, a proposal that does not provide any significant first NCE service but which provides a second NCE service to a comparatively large population will be preferred over another such proposal providing second NCE service to a significantly smaller population. This threshold 307(b) analysis will not be undertaken at the application stage for NCE applications filed for channels identified in the television and radio Table of Allotments as reserved specifically for NCE use, as the 307(b) analysis has been previously conducted in the rulemaking component of the process when the designated community and channel were added to the table of allotments.

25. We agree with commenters that differences between proposals should be decisional only if they are significant. Mohave Community College, for example, suggests that we consider the provision of a first or a second NCE service insignificant unless the new service would reach at least 2,000 people or at least 5% of the people within the proposed coverage area. We generally concur with this suggestion, and with the 2,000 person minimum, but believe that the percentage difference in population coverage must be greater if it is to distinguish between applicants in well populated areas, as a threshold matter. Thus, for purposes of determining whether fair distribution of service dictates grant of one NCE radio application over another in a Section 307(b) context, we will first consider whether applicants who are proposing to serve different communities will provide the first or second NCE aural signal to at least 10% of the persons within the 60 dBu (1mV/m) service contours of their proposed NCE FM stations. For example, if census data indicates that 25,000 people live within a proposed NCE-FM station's service contour, the station would have to offer first or second NCE aural service to at least 2,500 people (10% of 25,000) to obtain a decisional preference. It is possible that more than one applicant might offer the same level (first or second) of NCE aural service to 10% or more of its coverage area. In such cases we will proceed to a second step, comparing the number of people receiving such new service from each station. We will grant the permit to the applicant which will provide the highest level (first or second) NCE aural service to at least 5,000 more people than the other applicants.¹⁶ Differences between competing proposals

¹⁶ This 5,000 population figure is larger than the de minimis standard used in allotment rule makings. See Seabrook, Texas, 10 FCC Rcd 9360 (1995). The higher number adopted here accounts for two differences between allotment proceedings and applications proceedings. First, allotment proceedings generally examine Section 307(b) issues in

that amount to less than 5,000 people would be considered insignificant, and we would then compare the proposals under a point system. Thus, in our example of a service area covering 25,000 people, the applicant who would provide first or second NCE aural service to 2,500 people would be considered equivalent to a competing applicant that would provide that same level of new service to up to 7,499 people (2,500 people plus fewer than 5,000 additional people) and a point system rather than a dispositive threshold preference would be used to compare these applicants. If, however, the second applicant serving a different community would offer the same level of new service to 7,500 or more people, the applicant providing new service to the larger population would prevail as a threshold matter, because its proposal would be superior by at least 5,000 people.

26. As commenters rightfully stress, a consistent method must be used to count population. Based on our experience in examining population data supplied to us by various applicants, we conclude that population in NCE applications should be derived from figures provided by the United States Bureau of the Census. Applicants would determine population by counting persons within each of the relevant census blocks, the smallest unit of population measure of the Census Bureau.¹⁷ Consulting engineers now commonly use this method to complete various types of broadcast application exhibits and its use here should produce consistent, reliable, and independently verifiable population data.

27. We also agree with commenters that a selection of one NCE applicant over another based on Section 307(b) considerations would not be meaningful were we to allow the prevailing applicant to amend its proposal and construct a facility with fewer or none of the benefits proposed. Therefore, we will adopt the suggestion that permits and licenses awarded to applicants based on Section 307(b) considerations be conditioned on construction and operation substantially as proposed. Furthermore, we will prohibit an NCE radio applicant receiving a decisive 307(b) preference from downgrading service to the area on which the 307(b) preferences was based for a period of four years, the length of the holding period that we adopt *infra*. We note that, generally, under existing commercial radio policy a mutually exclusive applicant that receives an allotment as a result of a

vastly underserved "white" and "gray" areas, so a difference in population of 1,000 people may be significant. When considering competing NCE applications, however, we will be focussing on the availability of NCE service, where presumably there will be other (commercial) service provided already. Second, in an allotment process, the party that "wins" gets a smaller advantage. When an allotment proposal succeeds, the result is merely the allotment of a station to a particular community, rather than the selection of a permittee. In contrast, the applicant prevailing in an application proceeding will receive a construction permit to the exclusion of other applicants.

¹⁷ The inclusion of a particular census block will be based on the block's unique centroid coordinates. Applicants must use the most recent census block data made available by the Census Bureau. The Bureau of Census currently releases census block data following each decennial census but does not provide revised mid-decade census block population data.

decisive Section 307(b) preference is not permitted to downgrade prior to one year of operation. Report and Order, Lower Classification of an FM Allotment, 4 FCC Rcd 2413, 2414 (1989). The longer (four year) period that we are adopting in the NCE context recognizes the greater benefit that this Section 307(b) preference provides to NCE applicants. An NCE applicant who prevails on Section 307(b) grounds at the application stage receives a construction permit, a definitive selection over other applicants, whereas commercial FM applicants who receive a Section 307(b) preference at the allotment stage must then file an application for a construction permit, which is subject to competition from others who also apply to be licensed on the allotted channel.

2. Points for Evaluating Applicants

28. For proceedings not resolved by our fair distribution analysis, we will apply the following point system to the competing applications. See paras. 114 and 115 infra (discussing allocation of nonreserved channels as reserved).

a. Diversity of Ownership (2 points)

29. The first element in the point system will be diversity of ownership. In the Further Notice we proposed to award two points for "local diversity," i.e., we proposed to award two points to the applicant if the principal community contour of the proposed NCE station does not overlap the principal community contour of any commonly controlled broadcast station. We stated that this proposal would foster our goal of broadcast diversity by enabling the local public to be served by differing NCE licensees. Further Notice at ¶ 21. We expressed concern, however, that favoring diversity might disadvantage state-wide educational networks, which often attempt to serve an entire state, and may have a state mandate to do so.¹⁸ In an effort to achieve that goal, the contours of a state network's stations may overlap, which could disadvantage it under a point system favoring local diversity.

30. Most commenters favor some type of diversity credit, believing that diversity of ownership serves the public interest by promoting differences in programming and viewpoints.¹⁹ The commenters disagree, however, over whether the credit should be for local diversity or national diversity. Commenters favoring consideration of only local diversity, such as St. Gabriel Communications, say that when one applicant already has a station serving an area, the public interest is best served by adding a new media voice. Colorado Christian University notes that without a credit for local diversity it would be easy for one entity to dominate in an individual community. Other commenters, however, believe that a credit for local diversity might harm existing local educational

¹⁸ See Further Notice at para. 14 (raised in the context of lotteries).

¹⁹ See, e.g., Comments of WAY-FM, Inc., et al. at 4-5.

stations. National Public Radio and various individual NCE licensees state that a credit for local diversity would favor non-local applicants with hundreds of stations across the country over a local applicant with only one existing station. NPR states that local stations may seek to acquire a second station for various reasons, including a desire to improve service to outlying areas that receive the station's signal only marginally or a desire to develop dual program services in the same area. For example, it says that a university operating one station with a music format may apply for another station, and program it with news and information. Some commenters favor awarding separate points to state-wide networks, which presumably would balance any disadvantage such networks might experience if they were unable to receive a local diversity credit due to overlapping contours of stations within the network.²⁰

31. Commenters opposed to local diversity as an element of a point system also are concerned that this factor might be subject to abuse. Station Resource Group believes that an experienced broadcaster with a good consulting engineer could "massage" the contour of the proposed station to avoid overlap with its existing station, and then modify the new station's contour later. Commenters state that relying on overlap of principal community contours is less than optimal in the NCE service because NCE stations are not currently required to place a principal community contour over their community of license.

32. Some commenters believe that the Commission's goals can better be achieved through a credit for national diversity. These commenters, such as National Public Radio, believe that small educators are being "squeezed out" by large groups wanting to establish national chains of NCE stations and propose that we apply a sliding scale of points to applicants, depending on the number of stations they control nationally. The points suggested vary from commenter to commenter. Alaska Public Telecommunications, for example, suggests 2 points for applicants with five or fewer stations in the same broadcast service (FM or TV); 1 point for applicants with 10 or fewer stations, a 2 point demerit for applicants with over 25 stations, and a 3 point demerit for applicants with over 50 same service stations nationwide. In response, Community Television maintains that applicants should not be penalized for their interests in other markets, such as by the demerit system discussed above, because this approach would attract novices to NCE broadcasting and drive out veteran broadcasters.

33. We have decided to include local diversity, but not national diversity, in the NCE point system. We have long considered diversity of local ownership a critical consideration because it enables the public to receive information reflecting a variety of viewpoints from different sources. In commercial broadcasting, even under the relaxed ownership provisions of the Telecommunications Act of 1996, local ownership of radio stations is restricted to a maximum of eight stations, no more than five of which can be in the same service (AM or FM), in the largest markets of 45 or more stations. Under recently

²⁰ See para. 56 infra.

adopted rules, local television ownership is still restricted to one or two stations, depending on the circumstances.²¹ In contrast, the role of national diversity in our commercial ownership rules has recently been reduced. There are no national radio ownership limits, the national television ownership limit has been eliminated, and the national television audience reach cap has been raised from 25% to 35%.²² We are not persuaded that national ownership plays such a significant role in NCE broadcasting that, contrary to the general trend in broadcasting, it should become a pivotal factor in licensing new stations.

34. Contrary to some commenters' views, we do not believe that a credit for local diversity would unduly limit the ability of the public to hear the viewpoint of existing NCE stations. With respect to the local NCE broadcaster who wants to offer better service to areas it now serves marginally, the broadcaster could achieve this result with a translator station, without constructing a second full service station.²³ With respect to the example of a college wanting to program multiple stations in different formats, the fewer existing stations licensed to that college, the easier it would be for it to plan its coverage to avoid any contour overlap, and therefore to qualify for the diversity credit. The college might be disadvantaged, as National Public Radio suggests, only if its multiple stations would cover the same area. In such circumstances we in fact do not think it is inappropriate to favor another applicant with no local outlet rather than permitting the local campus to express what may be the same editorial viewpoint through two separate outlets. We do recognize that different equities might apply to a larger university system providing educational services on multiple campuses throughout a state, for which it would be harder to avoid contour overlap. However, such applicants will not be disadvantaged because, if they did not qualify for the local diversity credit, they could likely qualify for an equal credit as a state-wide network, as discussed in paragraphs 56 to 61 *infra*. As for the concern that small local educators could be "squeezed out" by large national chains of NCE stations, we consider this a valid concern, and will address it by including a localism factor in our point system, and by considering the extent of an applicant's national broadcast interests as a secondary factor, used as a tie breaker.

35. We believe that principal community (city grade) contour is the most appropriate

²¹ See Report and Order, Broadcast Television National Ownership Rules, MM Docket Nos. 91-221 and 87-8, FCC 99-209 (Aug. 6, 1999).

²² Order, National Television Ownership and Dual Network Operations, 11 FCC Rcd 12374 (1996); 47 C.F.R. § 73.3555 (e). See also Broadcast Television National Ownership Rules, MM Docket Nos. 96-222, 91-221, and 87-8, FCC 99-209 (Aug. 6, 1999).

²³ NCE radio licensees are able to operate translators more readily than their commercial counterparts because the restriction prohibiting a commercial station from operating a translator that extends the primary station's service area does not apply to NCE licensees. 47 C.F.R. § 74.1232.

benchmark for examining local diversity.²⁴ Most of a station's listeners generally are located within this contour. Accordingly, to foster diversity for most of a proposed NCE station's listeners, we will award two points to an applicant if the principal community (city grade) contour of the proposed station does not overlap the principal community (city grade) contour of any attributable NCE or commercial station (comparing radio to radio and television to television).²⁵ We discuss attribution in the NCE context in paragraphs 75 - 79 infra.

36. We specifically note that the principal community contour that we are using for purposes of determining this diversity credit, is smaller than the contours that we will use for purposes of determining whether a radio applicant should prevail based on fair distribution or whether a radio or television applicant should receive any points for its technical proposal. We have decided for purposes of considering diversity points, not to use larger contours (such as the 1 mV/m contour for FM radio and the Grade A or B contours for television), which are used for applying other points. Use of larger contours could preclude existing licensees from receiving diversity points, even if their existing stations are relatively distant from the proposed new station and would thus share few potential listeners. This is especially so for television stations, where the Grade A and Grade B contours can cover very large areas. Use of the principal community (city grade) contour focuses our diversity consideration on the area where the majority of a station's listeners are located.²⁶ We also note that, for radio, use of the principal community (city grade) contour follows existing policy, in which the Commission examines a somewhat smaller area for purposes of applying our commercial radio multiple ownership rules than for examining service area for our technical rules and fair distribution.

b. Technical Parameters (generally 1 point)

37. We proposed in the Further Notice to favor applicants who serve significantly larger areas and populations. Specifically, we proposed to award a point if there is a 10 percent or greater difference in the area and population to be served in one proposal than in a

²⁴ Unlike commercial stations, NCE FM stations are not required to provide a minimum field strength signal over their community. 47 C.F.R. § 73.315(a), Note a. We have, however, in a separate proceeding, proposed to begin requiring them to provide 60 dBu (1 mV/m) service to at least a portion of their community of license. Technical Streamlining, 13 FCC Rcd at 14,876 (1998).

²⁵ The principal community (city grade) contours are the 5 mV/m for AM stations under Section 73.24(i), the 3.16 mV/m for FM stations calculated in accordance with Section 73.313(c).

²⁶ For example, we have in a separate proceeding noted that a study by NBC shows that at least 72.4 percent of AM audiences are within the AM's station's principal community contour and that at least 63.8 of FM audiences are located with the FM station's principal community contour. First Report and Order, Broadcast Multiple Ownership Rules, MM Docket No. 87-7, 4 FCC Rcd 1723 (1989).

competing proposal. We proposed that, generally, this would be a one point credit, except that in certain rare instances an applicant with a far superior proposal could get two points. We proposed that applicants demonstrate both larger population and area because both are meritorious factors, and because it would otherwise be difficult, in the streamlined point system, to distinguish between mutually exclusive applications, one of which would serve a populous urban area with many existing radio stations, and the other of which would offer service to a wide area with fewer people and fewer existing service options.

38. Several commenters supported this proposal without revision.²⁷ Several others believe that clarifications would be needed to make this factor work, so that different engineers will derive consistent results. Mohave Community College suggests that the Commission should make the calculation of area and population itself or should require competing applicants to submit a joint engineering report calculating area and population in a manner agreed to by all parties. A few commenters oppose any credit for technical factors. Americans for Radio Diversity states that small community-focused stations sometimes better serve the public than stations reaching larger areas and populations. Community Television, Inc. is concerned that applicants may propose more than they are willing to build and then downgrade after receiving the credit.

39. We will adopt, with clarification and safeguards, a credit for technical parameters. We believe that for full power noncommercial educational stations, the public interest is best met when applicants maximize their facilities to reach the widest area and population. Thus we will give a one point credit to the applicant that covers the largest area and population, provided that this applicant covers at least 10% greater area and 10% greater population than the next best technical proposal. In rare instances in which the top applicant covers a 25% greater area and population than the next best proposal, we will award two points.²⁸ We are not suggesting that a small station that does not qualify for this credit cannot also provide excellent programming, only that fewer people and areas benefit from that programming.

40. Of course, as commenters observe, this credit would not be meaningful if applicants could subsequently modify their facilities to cover smaller areas and populations. As with stations prevailing on Section 307(b) factors, we will condition new NCE authorizations that receive credit for technical parameters on construction of the facility substantially as authorized. If a modification is necessary, the applicant will be required to serve an equivalent area and population, unless the applicant makes a compelling showing that the

²⁷ E.g. Comments of Faith Broadcasting at 7; Comments of NPR, et al. at 23.

²⁸ The Further Notice, proposed a slightly different system of awarding these points based on whether a first application is 10% greater than a second application, which is in turn 10% greater than a third application. We believe that the method proposed, which compares only the best and second best technical proposals, is simpler for both the applicant and the Commission.

modification would be in the public interest.²⁹ We also agree with commenters that all applicants must use the same standards so that they can be meaningfully compared. As established above, population should be based on the most recent census block data made available by the Census Bureau. See paragraph 26 *supra*. Area will be measured by the number of square kilometers within the 60 dBu service contour of FM stations and the Grade B contour of television stations. These contours will be calculated using the standard predicted contours established in our rules. 47 C.F.R. §§ 73.313(c) (FM) and 73.683 (TV).

c. Localism – Established Local Applicant (3 points)

41. Among other factors on which we sought comment was a "local educational presence," giving certain established local organizations a credit over new or distant organizations. We based this proposal on spectrum efficiency, stating that it was more efficient to award a permit to a local applicant whose educational goals are limited to a specific geographic region, than to a non-local applicant who could apply in other locations where the spectrum was more readily available. For example, we anticipated that a college might be able to show that it could only use a station in the immediate vicinity of its campus. We specifically distinguished the local educational presence proposal from other localism indicia that might be based on assumptions of superiority of a local applicant's qualifications or its programming. We noted that we were concerned about whether such assumptions might raise issues under *Bechtel v. FCC*, which overturned as unsupported a core credit formerly used in commercial proceedings. Specifically, it overturned our "integration" credit, which awarded an applicant a significant comparative advantage if the applicant proposed to be an owner-manager, working at the station for which the applicant sought our authorization. Many commenters, however, express strong support for localism, urging us to adopt a greater point credit than originally proposed, and arguing that such a credit would not be inconsistent with the *Bechtel* case.

42. Given the strong support for localism in the comments, we have reviewed the concerns expressed by the court in *Bechtel*. A primary concern underlying the court's decision invalidating the central comparative criterion used to select commercial broadcast licensees was that there was no obligation for a successful applicant to adhere to its integration proposal, and no evidence indicating the extent to which the applicants had kept such promises voluntarily in the past. In addition to this lack of permanence, the claimed public interest advantages of integration were, in the court's view, based on a mere "predictive judgment" not substantiated by adequate evidence. Finally, the court was concerned that the Commission's selection criteria for commercial applicants emphasized

²⁹ We expressed similar concern about commercial stations proposing to downgrade after being awarded a permit in a comparative allocation proceeding based on technical superiority. *Report and Order, Lower Classification of an FM Allotment*, 4 FCC Rcd 2413, 2414 (1989).

integration, and in particular quantitative integration, to the exclusion of other factors – such as spectrum efficiency, broadcast experience, and local residence – that could conceivably affect a station's performance.³⁰ By way of example, the court observed that, although licensee awareness of and responsiveness to community needs was integration's stated goal, "[a]n applicant whose owner-manager knows nothing about . . . the community but promises to work a 40-hour week" would prevail over a life-long resident of the community not proposing to work full-time. 10 F.3d at 882.

43. After careful review, we agree with commenters that, bearing in mind the concerns articulated in Bechtel, it is appropriate to adopt a localism credit in the unique circumstances presented by competing applications for a permit to construct a noncommercial educational broadcast station. The Bechtel court, although invalidating our integration criterion generally, nevertheless recognized that an applicant who is familiar with the community is likely to be aware of its special needs. Bechtel, 10 F.3d at 885.³¹ In the context of noncommercial educational broadcasting, the Commission has long recognized the unique role played by localism, and its public interest significance is amply documented.

44. The history and mission of NCE broadcasting recognize the importance of localism, and localism has indeed been a linchpin to successful NCE services. As the Center for Media Education demonstrates, the 1967 report of the Carnegie Commission on Educational Television shows that localism was a principle on which the NCE service was built. The Carnegie Report, on which Congress relied to develop and improve noncommercial educational television stations, reflects the ongoing vision of local communities as the heart of educational broadcasting:

Educational television is to be constructed on the firm foundation of strong and energetic local stations. The heart of the system is to be in the community. . . [T]he overwhelming proportion of programs will be produced in the stations. . . local skills and crafts will be utilized and tapped. . . . Like a good metropolitan newspaper, the local station will reflect the entire nation and the world, while maintaining a firm grasp on the nature and needs of the people it serves.

³⁰ Quantitative integration measured the ownership percentages of those owners proposing to have a managerial position at the station and varied depending on whether the owner(s) would work full-time or part-time. Quantitative credit, in turn, affected the weight given to various qualitative "enhancement" factors, including local residence of integrated owners.

³¹ "Familiarity with a community seems much more likely than station visitors or correspondence to make one aware of community needs." 10 F.3d at 885. See also Orion Communications, Ltd., 131 F.3d 176, 179-80 (D.C. Cir. 1997), suggesting the continuing relevance of local familiarity after Bechtel, at least in terms of selecting an interim operator who would best serve the public's interest in responsive programming.

Reply Comments of Center for Media Education citing Carnegie Commission on Educational Television, Public Television: A Program for Action, 87 (1967).

45. The Communications Act itself also recognizes the importance of localism in educational broadcasting. For example, the portion of the Communications Act which establishes the Corporation for Public Broadcasting states:

Public television and radio stations constitute valuable local community resources for utilizing electronic media to address national concerns and solve local problems through community programs and outreach programs.

47 U.S.C. § 396.

46. The Commission, in another educational service, has likewise recognized the importance of localism. In the Instructional Television Fixed Service (ITFS) the Commission adopted a point system in which the local nature of the applicant was the most determinative factor.³² See Second Report and Order, ITFS, MM Docket No. 83-523, 101 FCC 2d 50 (1985), recon. denied Memorandum Opinion and Order, MM Docket No. 83-523, 59 R.R.2d 1355 (1986). As we noted in the Further Notice, the ITFS and NCE services are not identical. NCE stations are broadcast services intended to educate the general public in a variety of settings, whereas ITFS stations are nonbroadcast services, intended primarily to provide formal educational programming to enrolled students of accredited schools. Nevertheless, education is a primary objective of both services, and our finding in the ITFS proceeding that education is essentially a local undertaking, is equally applicable to the NCE broadcast service. Likewise, our observation in the ITFS proceeding that local entities best understand the educational needs and academic standards of their communities and are the best authorities for selecting programming to meet those needs is relevant here. Second Report and Order, ITFS, MM Docket No. 83-523, 101 FCC 2d 49 (1985). While we recognized in that proceeding that non-local entities can complement the service offered by local licensees, and that there are actions that non-local entities can take to mitigate their lack of local credentials, we found local entities preferable from a public interest perspective because local entities have more expertise and accountability when it comes to serving the educational needs of the local community. Id.

47. The joint comments of National Public Radio, Association of America's Public Television Stations, and the Corporation for Public Broadcasting, provide publicly available data and studies evidencing the importance that localism plays in NCE broadcasting. They note that information compiled by the Corporation for Public Broadcasting (CPB) indicates

³² The Balanced Budget Act of 1997 did not exempt ITFS from auction and, thus, point systems are not now used in ITFS. See 47 U.S.C. § 309(j).

that most of public broadcasters funded by CPB are local.³³ They maintain that the preponderance of local entities in NCE broadcasting results in local programming. Of 633 NCE radio stations participating in a study, 100% air some local programming. On average, local programming constituted 50% of public radio stations' weekly broadcasts.³⁴ In addition, 95% of all public television stations receiving CPB grants reported providing instructional service to schools during the 1995-96 academic year, including 81% providing instructional programming to elementary schools and 79% providing instructional programming to secondary schools during that time period.³⁵ We believe that such studies demonstrate the unique role of locally based entities providing NCE local educational programming and that our selection process should continue to foster this role.

48. Given the special, long-recognized, significance of localism to noncommercial educational broadcasting, we will award points for localism in a manner that does not implicate the concerns raised by the court in Bechtel. In addition to the ample documentation of the pivotal role traditionally assigned to localism, as reflected in the statute, Commission policies, and publicly available data evidencing industry practice, our experience has been that NCE licensees are transferred and assigned less frequently than commercial licenses.³⁶ As a result, the public interest advantages derived from localism are likely to have a more lasting impact than was the case in the commercial context, where the court found we lacked evidence as to "how long the typical successful applicant adheres to his integration proposal." Bechtel, 10 F.3d at 880. Further, to ensure that the benefits of localism are not purely ephemeral and as supported by numerous commenters, we have, as discussed in greater detail below, decided to establish a four year holding period of on-air operations during which licensees would be required to maintain the characteristics for which they receive credit in a point system.

49. Finally, the public interest significance of localism is not diluted by an artificially

³³ Comments of NPR, et al. at 11, n. 20 citing Corporation for Public Broadcasting, Frequently Asked Questions About Public Broadcasting (1997) (www.cpb.org/content/faq).

³⁴ Comments of NPR, et al. at 12, n.21 citing Public Radio Programming Study, Fiscal Year 1996, Research Note No. 105 (November 1997).

³⁵ Comments of NPR, et al. at 12, n.22 citing Elementary and Secondary Educational Services of Public Television Grantees: Highlights from 1997 Station Activities Survey (November 1997).

³⁶ Typically, less than one percent of NCE radio or television stations are assigned or transferred in a year. For example in calendar year 1998, we received only three applications to assign or transfer NCE television licenses and permits, less than one percent of all NCE television stations. During the same period there were 230 applications to assign or transfer commercial television station licenses, which in relation to the number of commercial television stations is approximately 18 percent. Radio statistics are similar. In a recent 12-month period, less than one percent of the total radio assignment and transfer applications were for NCE FM radio stations.

complex formula that elevates quantitative over qualitative considerations. Rather, we adopt a straightforward credit, with minimum eligibility requirements only as necessary to ensure that the credit is reserved for truly local applicants and thus fosters participation by local entities in noncommercial educational broadcasting. See paragraphs 54-55 *infra*. Significantly, that credit is not tied to ownership or a promise to work a minimum number of hours each week at the station, and does not endorse a particular type of business structure or practice. Its premise, moreover, is not simply area familiarity or uniquely responsive programming but the recognition that education historically is a local undertaking, as evidenced by the historical importance of localism in noncommercial educational broadcasting.

50. Notwithstanding clear factual distinctions between the integration criterion invalidated by the court in Bechtel and the award of points for localism in selecting among competing applicants for the reserved band, we acknowledge that there is a certain tension with our decision to dispense with comparative hearings in the commercial context. Following Bechtel and the resulting freeze on the adjudication of comparative broadcast cases, Congress enacted legislation authorizing the use of auctions to resolve mutual exclusivity among competing applications for commercial broadcast licenses. Faced with a choice of using either auctions or comparative hearings to resolve a select group of pending cases, the Commission determined that the public interest would be better served by using auctions. Given the court's sweeping criticism of our integration criterion, and especially in light of the congressionally endorsed alternative of using auctions, we were reluctant to resurrect elements of that criterion – such as local residence – recognized by the Bechtel court as having potential public interest significance in selecting a broadcast licensee, at least in certain circumstances. Auctions would be speedier and fairer, we concluded, and would avoid the delay entailed in developing and defending new selection criteria to resolve the limited number of pending commercial cases in which auctions were not required.

51. Here, however, using auctions to select among competing applicants for spectrum reserved for noncommercial educational broadcasting is not a viable option from a policy standpoint and, in fact, such applications are beyond the Commission's competitive bidding authority under Section 309(j)(2)(C). In these circumstances and especially given that education historically is a local undertaking, we conclude that it is appropriate to incorporate a localism credit in the point system we adopt today to resolve competing applications for noncommercial educational channels.

52. We have considered, but disagree with, the minority viewpoint that a credit for localism would adversely impact religious organizations or small organizations. A localism credit is religion-neutral and size-neutral. Whether religious or secular, large or small, an organization based in the local community would qualify for the credit. Moreover, organizations both with and without religious affiliation, and of varying sizes

support a credit for localism.³⁷

53. Accordingly, we will adopt a credit for established local applicants. In the ITFS point system, local applicants received four out of a possible eleven points. See 47 C.F.R. § 73.913(b). We believe that local applicants should receive points in a similar proportion in the NCE point system, and thus will assign established local applicants three instead of the two points originally proposed. We had proposed that to qualify for the credit, local entities would demonstrate that they could meet their educational goals only with a local station, such as one on an applicant's college campus, and not with a station located further away. We will not adopt this proposal, finding it sufficient for applicants to demonstrate that they are local and established, as defined below.

54. There is disagreement in the comments about who should be considered local. NPR, for example, defines local as (a) located within 100 miles of the proposed facilities; (b) located within the same state; or (c) if part of a state-wide plan, located in the same state or a bordering state. Others think that this proposal is too broad, particularly with respect to stations located in large states. Americans for Radio Diversity would consider a group local if the licensee or the majority of the governing board is located within 25 miles of the transmitter. We will base the definition of local on the standards used in ITFS, as modified in response to commenter suggestions. Those physically headquartered, having a campus, or having 75% of board members³⁸ residing within 25 miles of the reference coordinates of the center of the proposed community of license³⁹ would be local for purposes of the credit. Governments would be local throughout the area within which their authority extends. For example, the New York State government would be considered local throughout New York State, including New York City, but the New York City Board of Education would be local only in New York City (or within 25 miles from the reference coordinates of the proposed community of license). These characteristics would be maintained in various ways, including a holding period discussed infra; a local main studio

³⁷ See, e.g., Comments of Colorado Christian University at 12-13 (organization with religious affiliation).

³⁸ We note that under basic eligibility requirements for NCE television applicants, there must be a majority (over 50%) of local board members in non-government entities. These local members must be broadly representative of elements of the community, as traditionally considered, (e.g. businesses, civic groups, professions, religious groups, schools, government). See Ascertainment of Community Problems by Broadcast Applicants, 41 Fed. Reg. 1372, 1384 (January 7, 1976).

³⁹ This mileage standard is similar to that which applies to the main studio location of commercial stations. See Report and Order, Commission Rules Regarding the Main Studio, MM Docket No. 97-138, 13 FCC Rcd 15691 (1998), aff'd 15 Com Reg. (P&F) 1158 (1999). A community's reference coordinates are generally the coordinates listed in the United States Department of Interior publication entitled "Index to the National Atlas of the United States." An alternative reference point, if none is listed in the Atlas Index, are the coordinates of the main post office. See 47 C.F.R. § 73.208(a)(1).

in radio; or by-laws requiring a 75% local board for non-governmental NCE organizations. As in ITFS, a local headquarters or residence must be a primary place of business or primary residence and not, for example, a post office box, lawyer's office, branch office, or vacation home, which would not provide sufficient contact between the station's decision and policy makers and the area to be served. Our localism credit encompasses many of the other localism-based credits suggested by the commenters and thus we will not adopt separate credits for factors such as enhanced local representation on the governing board.

55. In the Further Notice we proposed that local applicants be "established" in order to receive the credit. This requirement would serve to limit the feigning of local qualifications, and also to establish the applicant's educational credentials in this particular area. The Further Notice proposed that an applicant be local for two years prior to application, as the standard for whether an organization qualified for a local credit. Few commenters address the time period. We will adopt the two year benchmark as proposed.

d. State-Wide Network Credit (2 points)

56. We asked whether we should award points for stations that would be part of an existing education plan of a state government. We noted in the Further Notice that since the very early days of NCE broadcasting, state-wide networks have ensured that educational programming is available throughout a specific area in a coordinated and organized manner most appropriate to that area, and especially to schools. Stations providing programming in furtherance of such plans have been pioneers in NCE service, often using the economic efficiencies of a centralized point of operation to bring new service to outlying areas within their jurisdiction. However, without a credit recognizing the merits of such applicants, an entity serving multiple schools, such as a state university system, might not be able to effectively compete in a point system. For example, the locations of a university system's campuses, and the possible overlapping signals of its associated broadcast stations, might consistently prevent the university system from receiving a credit for local diversity, making it difficult for the university to expand the reach of its educational programming.

57. Only a few commenters addressed this issue, and those discussing the issue focus on whether the credit would be available to government supported networks only, or also to private networks. National Public Radio proposes that governmental licensees who apply for a new station as part of a governmental state-wide plan would receive credit for diversity of ownership regardless of the number of stations already owned, because state licensees have a special interest in and responsibility for serving the diverse needs and interests of their jurisdictions. Comments of NPR at 21. Sound of Life, Inc., opposes a credit for governmental state plans, which it views as a government choice of one type of program content over another. Others believe that private organizations should also qualify for a state-wide network credit. For example, Colorado Christian College, a private institution, considers itself to operate a state-wide educational network because it is an accredited school operating five full-time campuses throughout the state of Colorado, has

three FM stations and many translators, and wishes to establish more stations as its college establishes campuses in more areas. Some commenters would extend the credit further to include all networks, including private networks covering regions larger than a single state.⁴⁰

58. We have decided to adopt a two point credit that will be available to both public and private entities, a larger class of applicants than originally proposed. While we recognize above that applicants proposing new NCE stations in areas where they do not operate any other station provide the benefits accruing from diverse local ownership of broadcast facilities, we also recognize the distinct benefits afforded by state-wide networks providing service to accredited schools. In our efforts to recognize the benefits provided by the former category of applicants, we do not wish to disadvantage the latter applicants, where the proposed new station will increase the number of schools served. Therefore, we will award a credit to the following entities if they cannot claim a credit for local diversity of ownership:

- (A) an entity, public or private, with authority over a minimum of 50 accredited full-time elementary and/or secondary schools within a single state and encompassed by the combined primary service contours of the proposed station and its existing station(s), if the existing station(s) are regularly providing programming to the schools in furtherance of their curriculum and the proposed station will increase the number of schools it will regularly serve;⁴¹ or
- (B) an accredited public or private institution of higher learning with a minimum of five full time campuses within a single state encompassed by the combined primary service contours of the proposed station and its existing station(s), if the existing station(s) are regularly providing programming to campuses in furtherance of their curriculum and the proposed station will increase the number of campuses it will regularly serve;⁴² or

⁴⁰ E.g., Comments of Taylor University Broadcasting at 2; Comments of Cedarville College at 4-5.

⁴¹ In selecting the number of schools, we relied on statistical information in the comments that small community television stations receiving funding from the Corporation for Public Broadcasting provide programming to a median number of 14 school districts with 103 schools. Comments of NPR, Chart II. Thus, a number of fifty elementary and secondary schools is approximately half the median number of schools currently served by the smallest NCE television licensees. We believe it is appropriate to adopt this number, to establish a standard that can apply both to radio and television, with radio capable of covering smaller areas than television.

⁴² Colleges and universities, in general, draw students from larger areas and serve more students than elementary and secondary schools. We selected five full-time in-state campuses of an accredited institution of higher learning based on our view that Colorado Christian College was reasonable in believing that broadcast service to five such campuses was similar to a state government's network.

- (C) an entity, public or private, with or without direct authority over schools, that will regularly provide programming for and in coordination with an entity or institution described in (a) or (b) above for use in its school curriculum.

59. Thus, the applicant need not be a government entity or a school itself to qualify for this credit. Both public and private licensees can provide educational programming material for use in accredited schools, in cooperation with an entity with authority over schools. One way for a private applicant to receive this credit would be for it to coordinate with a state government and to participate in the government's state-wide education plan. Because the state government has jurisdiction over schools, and the private entity would be operating in accordance with that plan, the Commission could be confident that stations broadcasting pursuant to the state plan would present programming that could be used in schools for educational purposes. Another way for a private applicant to receive this credit would be to coordinate with a private school system. For example, an archdiocese might, on its own, or in cooperation with a broadcast organization, wish to broadcast educational programming that could be used in schools under the archdiocese's jurisdiction. Thus, we clarify for the commenters who view this credit as favoring government speakers over private speakers, that is not our intention. In response to commenters who are concerned about fairness to nonprofit corporations, who are not themselves eligible for accreditation because they are not institutions of learning, we clarify that such corporations may nevertheless qualify for the credit if they are providing programming to accredited schools in coordination with those schools.⁴³ See 47 C.F.R. §§ 73.503 (a) and 73.621(a).

60. In this manner, applicants who will provide educational service to many schools, but who cannot achieve that goal without some-signal contour overlap and resulting loss of the local diversity credit, will not be placed at a disadvantage in comparison to applicants serving a smaller number of schools. An applicant serving many schools would receive two points as a state-wide network, while a competing applicant serving fewer schools would likely receive an equal number of points for local diversity of ownership, because its service to fewer school locations increases its ability to avoid signal overlap. No entity may claim both the diversity credit and the state-wide network credit in any particular application. We recognize that there are also larger national and regional networks of noncommercial stations that enjoy some of the same operating efficiencies as the entities who will be eligible for this credit, but which do not have relationships with and provide program service to accredited schools. Those types of networks will not be eligible for this credit. As those larger networks are spread out over wider areas, they would not generally experience the same level of difficulty achieving local diversity as state-wide networks. Further, we do not believe that national and regional networks are able to provide equivalently focused educational benefits. Such networks are generally satellite operations of distant stations, without the ability to set the educational policies for schools or have schools accountable to them. It would thus be unlikely for schools to rely on such networks to provide programming on a regular and ongoing basis that complements or

⁴³ Comments of Faith Broadcasting, Inc. at 8; Comments of Houston Christian Broadcasters at 13-14.

reinforces a locally established curriculum. As we stated regarding national networks in the ITFS proceeding, "a national educational network may relay programming throughout the country including to schools but an in-state consortium is an adjunct of the schools themselves." Memorandum Opinion and Order, ITFS, MM Docket No. 83-523, 59 R.R.2d 1355 (1986).

61. We note that Section 73.502 of our rules currently states that we should consider in licensing NCE FM stations "the extent to which each application meets the requirements of any state-wide plan for noncommercial educational FM broadcast stations filed with the Commission, provided that such plans afford fair treatment to public and private educational institutions, urban and rural, at the primary, secondary, higher, and adult educational levels, and appear otherwise fair and equitable." 47 C.F.R. Section 502. This rule does not define the term 'state-wide plan,' but appears to use the term in a narrower sense than the state-wide network credit we are adopting today. Because Section 73.502 is superseded by the rules we adopt in this proceeding, we will eliminate it and incorporate the revised definition of state networks into our new point system rules.

e. Consideration of Minority Control Deferred

62. In the Further Notice we asked for comments on whether applicants controlled by minorities should be given any points, to further diversify the NCE mass media service. We noted that any race-based preference would need to withstand strict scrutiny pursuant to Adarand Constructors v. Pena, 515 U.S. 200 (1995). Most commenters addressing this issue are opposed to adopting a minority preference at this time. Alaska Public Telecommunications believes that such a preference is unnecessary because NCE broadcasters have a long history of providing diverse programming to underserved audiences, particularly minorities and children, without any such preference. Others are concerned about a possible constitutional challenge under Adarand.⁴⁴ We find particularly persuasive the views of the National Federation of Community Broadcasters (NFCB). NFCB suggests that we continue to conduct necessary fact-finding studies to justify minority preferences under Adarand. If the results of the studies support a minority preference, NFCB urges us to commence a rule making proceeding at that time to add a minority credit to the point system adopted herein. We will adopt this suggestion, and defer consideration of a minority control credit until we have additional information from ongoing studies.

f. Other Factors Not Selected

63. We received several suggestions of other possible factors, which we have considered for inclusion in a point system but have decided not to adopt. Most of these factors were supported only by the commenter who proposed the idea. A few, however, received more

⁴⁴ E.g. Comments of Cornerstone Community Radio at 3; Comments of Pinebrook Foundation, Inc. at 6.

support. We will address briefly the four ideas which received the most discussion.

64. Existing Broadcasters. There were several proposals that would favor existing broadcasters or existing stations in some way. For example, there are suggestions that existing translators be given preference to upgrade to full service stations, that experienced broadcasters receive additional points, and that existing stations making major changes be preferred over new stations.⁴⁵ While maintaining existing service is a good goal, so is obtaining new service. We do not believe that a case has been made for always favoring one over the other as a general practice in NCE broadcasting.⁴⁶ With respect to favoring experienced broadcasters over newer broadcasters, we also cannot categorically conclude that one is always preferable to the other. An experienced broadcaster has a level of expertise that a novice may lack. Thus, our old commercial comparative criteria considered an applicant's broadcast experience. We also recognize, however, that new entrants bring new ideas and diverse voices to broadcasting. Thus, we have, in commercial auctions proceedings, established a bidding credit for new entrants. Because we cannot conclude as a general matter that broadcast experience is always preferable to new voices and diversity in the context at issue here, we decline to adopt any credit for this factor.

65. Locally-Originated Programming. Several commenters address local programming as part of a point system. For example, the National Federation of Community Broadcasters suggests that we award one point if members of the local community will have access to the proposed station to air programming, and between two and five points depending on the percentage of locally originated programming (between 10% and 75%) that the applicant will provide. WAY-FM, Inc. opposes such a credit. It states that a local programming credit would amount to a government intrusion into issues of program content, implicitly supporting certain types of programming over other types of programming. It also states that it would be difficult to define local programming, and even more difficult to ensure that broadcasters fulfill their commitment.

66. We will not adopt points for local programming or local access. We have historically afforded full power broadcast licensees, commercial and noncommercial, maximum flexibility in selecting programming that the licensees, in their discretion, believe will address local needs. The record in this proceeding provides no basis for departure from that policy. We note that the local nature of programming is relevant to applicant selection

⁴⁵ Since the adoption of the Further Notice the Commission has, in a separate proceeding, more narrowly defined what constitutes a "major change." More NCE upgrades are now considered minor and not subject to competing applications. Report and Order, Streamlining of Radio Technical Rules, MM Docket No. 98-93, 19 Com Reg (P&F) 329 (1999).

⁴⁶ This decision is comparable to our decision in the Competitive Bidding proceeding to have applicants for new stations and applicants for major changes to existing stations compete equally in auctions.

in the newly created low power FM service⁴⁷ and to applicant eligibility in the Class A low power television service. However, both of those services are highly localized in nature, covering limited areas with reduced power facilities. We do not find the considerations that led us to give weight to program origination in authorizing these services of equal import in initial selection among applicants for full service NCE broadcast stations, which have broader goals and a wider signal range. We further note that there is currently an open question, in the digital television proceeding, of whether to quantify public interest programming requirements for all television licensees. We believe that such matters are most appropriately debated as service-wide rules, as in that proceeding, and not in the present proceeding which concerns only construction permits for new stations.⁴⁸

67. Funding Sources. Several organizations support preferences based on funding. National Public Radio, for example, states that we should prefer applicants who have been found eligible for the government-administered Public Telecommunications Funding Program (PTFP). It says that PTFP qualified applicants have already passed a public interest test, based in part on the Commission's spectrum efficiency objectives. National Religious Broadcasters opposes such a credit because it says that organizations with religious affiliations are not eligible to apply for government funding. We do not believe that there is a sufficient basis for our adopting funding criteria as an additional credit. When we award a permit to a qualified applicant, the permittee may construct the station with public grant monies for which it is eligible, or with private monies which it has secured. The public interest factors that we believe are important to the selection of NCE licensees and incorporated in our point system, generally account for the public interest considerations that are applied in the PTFP award program. We therefore see no reason to include a separate point based on funding sources.

68. Finder's Preference. Related to the first to file approach rejected above, several commenters support awarding credit in a point system to the first applicant to file its application. These commenters seek to distinguish between applicants who undertake the engineering and legal studies needed to identify an available channel from challengers filing "me too" applications.⁴⁹ The impetus for the finder's preference suggestion appears to be commenter frustration with the current A/B cut-off system for NCE applicants, in which initial applications are announced on a public notice, triggering an opportunity to file competing applications. This process often results in mutually exclusive applications.

⁴⁷ See Report and Order, Creation of Low Power Radio Service, MM Docket No. 99-25 (January 27, 2000) (awarding points to LPFM applicants airing at least eight hours a day of programming produced within ten miles of the community.)

⁴⁸ See Notice of Inquiry, Public Interest Obligations of TV Broadcast Licensees, MM Docket No. 99-360 (Dec. 20, 1999).

⁴⁹ Comments of Dale Jackson at 2-3; Comments of Cornerstone Community Radio, Inc. at 2.

As discussed infra, we will address those concerns by changing the filing procedures to a window system. We therefore find further consideration of a finder's preference unnecessary.

C. Tie Breakers

69. In a point system it is possible that two or more applicants may receive the same number of points. We asked for comments on how to break such ties. The Further Notice discussed, but tentatively rejected, use of a "finder's preference" as a tie breaker. Among the options that we considered more viable were mandatory share-time arrangements; a tie-breaker lottery weighted in accordance with statutory requirements; and use of a secondary factor, such as one considered for the primary point system but not adopted.

70. The commenters discuss various tie breaker options and there is some support and opposition to each. Some considered lotteries less objectionable as a tie breaker than as a primary selection process,⁵⁰ but others remained concerned about the required statutory weighting.⁵¹ A tie breaker based on the first applicant to file would be an objective method, but commenters expressed concern that any first to file method would encourage "speed over need"⁵² and "races" to the filing room.⁵³ One commenter suggests that we use traditional hearings to break ties,⁵⁴ but the record contains significant support for eliminating traditional hearings. Moreover, given the extensive resources required, it is difficult to justify conducting a full-blown hearing, when the differences among the applicants are admittedly slight. Many commenters considered mandatory timesharing unworkable for applicants and believed it should not be used as a tie breaker.⁵⁵

71. Some commenters believe that tied applicants will be able to work out a tie breaker solution on their own, if given a reasonable settlement period, and that a tie breaker should only be used after providing such a settlement period.⁵⁶ For cases in which a settlement

⁵⁰ See Comments of CSN International at 3; Comments of Sound of Life, Inc. at 16.

⁵¹ See Comments of National Public Radio at 27.

⁵² See Comments of Colorado Christian University at 16.

⁵³ Comments of Roaring Fork Public Radio Translator, Inc., et al. at 5.

⁵⁴ See, e.g., Reply Comments of Center for Media Education, et al. at 16-17.

⁵⁵ E.g., Comments of Station Resource Group at 19; Comments of Alaska Public Telecommunications at 15.

⁵⁶ See generally Reply Comments of Mohave Community College at 12.

can not be reached, a number of commenters suggest that we should establish a new factor to serve as a tie breaker, such as awarding a license to the applicant with the fewest pending applications at the time of filing.⁵⁷ They state that an applicant with many applications is likely to secure a license elsewhere, while an applicant with few applications has likely determined that only these few locations would serve its educational purpose. Other commenters suggest that the Commission choose a solution that allows it to grant as many of the applications as possible, either by suggesting engineering solutions to the applicants or by granting whatever combination of licenses would result in the most successful proposals. For example, if two applications could be granted but for the existence of a competing third application, one commenter suggests that we should grant those two.⁵⁸

72. After considering the comments, we have concluded that, if there is a tie, we will conduct a tie breaker that combines and follows several suggestions of the commenters, and that is structurally similar to the tie breaker formerly used in the ITFS service. Third Report and Order, Instructional Television Fixed Service, MM Docket No. 83-523, 4 FCC Rcd 4830 (1989). Under the tie breaker, a permit will be awarded to the applicant who, at the time of filing, had the fewest existing station authorizations (licenses and construction permits) in the same service(i.e. radio or TV whether commercial or noncommercial) nationally .⁵⁹ Stations of the applicant itself and those with attributable interests, as discussed below, will be counted for this determination. This should help to address the commenter concern that small local educators with no or few other broadcast interests should not be "squeezed out" by large national chains of NCE stations. As indicated above, we do not believe that national ownership factors are especially important in making an initial determination of the applicant's quality in the initial stages of a point system, but we do believe, among equally qualified applicants, that the public should have the opportunity to receive service from the applicant who has the fewest existing outlets to express a particular viewpoint.

73. As a secondary tie breaker, we will consider which applicant has the fewest pending new and major change applications in the same service at the time of filing. This factor, suggested by the commenters, encourages applicants to file judiciously, to conserve spectrum, and to reduce the number of speculative "me too" applications. We choose this

⁵⁷ See Comments of National Public Radio, et al. at 26-27; Comments of KBPS Public Radio Foundation at 2.

⁵⁸ Comments of Colorado Christian University at 17.

⁵⁹ For purposes of counting same service stations in a tie breaker, we would require NCE radio applicants to count all attributable radio stations (AM and FM, commercial and noncommercial). NCE television applicants would count all attributable television stations, commercial and noncommercial. FM translator applicants would generally count all attributable FM translator stations that are not fill-in stations, except that if competing applicants have only fill-in translators, then we will compare the number of fill-in stations.